Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JOE WALLACE, doing business as Video Liquidators,
Petitioner,

v.

MICHAEL E. WELLBORN, Judge, County Court of Law Judge; LISA SHEPPARD, Department of Public Safety Agent; DANNY CONTRERAS, Department of Public Safety Agent; SAN PATRICIO COUNTY; DAVID H. AKEN, JR., San Patricio County Attorney,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was it reversible error for the trial court to find that there is no absolute right to a prior adversary hearing where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution?

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SUPPLEMENTAL STATUTORY PROVISION INVOLVED

Vernon's Texas Codes Annotated, Business and Commerce Code, Section 35.94(a).

STATEMENT OF THE CASE

Based on public complaints, the Texas Department of Public Safety began a criminal investigation of four Portland, Texas adult video stores in October 1995. During October and November 1995, Respondent Danny Contreras, an undercover sergeant with the Texas Department of Public Safety (herein "DPS"), entered

one of the four stores, Video Liquidators, which was owned by Petitioner, Joe Wallace. After visually inspecting numerous videos and magazines whose covers depicted sodomy, masturbation, lewd exhibition of the genitals, cunnilingus, fellatio and male and female genitals in a state of sexual stimulation and arousal, Sgt. Contreras purchased several of these video cassette tapes and magazines from Wallace. (Appendix G, App.27-29.) These items were then stored at DPS headquarters in Corpus Christi, Texas.

Thereafter, Respondent Lisa Sheppard, the DPS sergeant/investigator in charge of the investigation, prepared and presented a detailed affidavit to San Patricio County Judge Michael Wellborn in support of search and seizure and search and arrest warrants to be executed at Video Liquidators.

On December 12, 1995, Judge Wellborn reviewed the affidavit, made a probable cause determination, and in signing the warrant, authorized law enforcement agents to seize, as evidence, all material and videotape recordings in violation of Texas Penal Code Chapter 43, subchapter (B), which outlaws the promotion of obscenity, and Vernon's Texas Codes Annotated Business and Commercial Code, Section 35.94(a), which outlaws the sale of videotapes that do not clearly display the manufacturer on the package cover.

On December 13, 1995, Sgt. Contreras, along with state and local law enforcement agents, executed the warrant at Video Liquidators and seized 2,134 videotapes, 42 magazines, 75 eight-millimeter movie reels, two birthday cards and 17 toys as evidence pursuant to the December 12, 1995, warrant. Likewise, Wallace was arrested for violating Texas Penal Code Chapter 43.21.

Following his arrest, Wallace exercised his right to a prompt judicial determination of the obscenity issue, demanding the return of the seized property. Wallace's two subsequent criminal trials

resulted in a mistrial and an acquittal respectively. Following his acquittal, each of the items which had been held as evidence in his criminal prosecution were returned to Wallace.

Wallace thereafter filed suit for damages against Sgts. Sheppard and Contreras, under 42 U.S.C. §1983. The trial court granted summary judgment on the basis of qualified immunity, finding that there is no absolute right to a prior adversary hearing where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. The United States Court of Appeals for the Fifth Circuit thereafter affirmed the trial court's decision, holding that Wallace had not shown a clearly-established right to a pre-seizure hearing.

ARGUMENTS FOR DENYING THE PETITION

In affirming the trial court below, the Fifth Circuit expressly tracked this Court's long-standing holding in *Heller v. New York*, 413 U.S. 483 (1973). However, despite the fact that *Heller* has held, for over 27 years, that there is no absolute right to a prior adversary hearing where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution, Wallace now seeks to convince this Court that *Heller* did in fact guarantee such a right. It does not. As demonstrated below, Wallace has not articulated a clearly established right under the facts of his case, but rather is attempting to have this Court overrule its holding in *Heller*. As such, the petition should be denied.

I. Wallace Did Not Establish That In 1995, He Had A Clearly Established Right To A Prior Adversarial Hearing Where Allegedly Obscene Material Is Seized, Pursuant To A Warrant, For The Purpose Of Preserving The Material As Evidence In A Criminal Prosecution.

When arguing about the state of the law concerning prior adversarial hearings, Wallace argues that lower courts (presumably including the trial court below) are "unwilling to make decisions because of the ambiguity." (Pet. at 5.) As such, Wallace himself has conceded that there is "ambiguity" concerning whether a clearly established right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution. On this basis alone, the Fifth Circuit was correct in affirming the summary judgment dismissal based on Qualified Immunity.

However, Wallace also argues that in *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979), this Court recognized such a clearly established right. A cursory review of the *Lo-Ji* opinion, however, dispels this argument. In *Lo-Ji*, a New York state police investigator purchased two videos from an "adult" bookstore, reviewed them, and determined that they were in violation of state obscenity laws. The investigator submitted an affidavit to the town justice who, relying on the affidavit, issued a warrant authorizing the search of the store and the seizure of other copies of the two tapes. *Lo-Ji*, 442 U.S. at 321.

This is where any similarity between the facts in the instant case sharply diverge from those in *Lo-Ji*. In issuing his warrant, the justice in *Lo-Ji* authorized the seizure of "[t]he following items which the Court independently [on examination] has determined to be possessed in violation" of state law. *Id.* However, at the time the warrant was issued, there were no items listed or described following this statement. *Id.* Instead, the justice

personally participated in the review and seizure of additional material at the bookstore and, *ex post facto,* added a list of the seized items to the warrant. *Id* at 321-324.

Based on the town justice's issuance of an open ended warrant to be completed while a search is being conducted, and the justice's personal participation in the execution of the warrant, this Court held that he "did not manifest the neutrality and detachment demanded of a judicial officer when presented with a warrant application for search and seizure." *Id.* at 326. Significantly, however, even considering the facts present in *Lo-Ji,* this Court did not specifically hold that a clearly established right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution.

Instead, the *Lo-Ji* Court cited *Heller's* long-standing rule that as long as a prompt adversarial hearing is available on the issue of obscenity, an adversary hearing prior to a seizure by lawful warrant would not materially increase First Amendment protection. *See Id.* at 328.

Wallace acknowledges that he was provided an adversarial hearing on the obscenity issue following the seizure in this case. His argument is, rather, that he had an absolute right to a pre-seizure hearing. This is exactly the same argument that was rejected by this Court twenty-seven years ago. *Heller*, 413 U.S. at 493. However, Wallace now argues to this Court that Sgts. Sheppard and Contreras should have known that this Court's true intention in 1973 was to establish just such a right. Wallace's argument is wholly without merit. As such, his Petition should be denied in its entirety.

II. The Fifth Circuit Decision In This Case Is Not In Conflict With That Of Any Other Circuit.

In his petition, Wallace does not identify any conflict among the circuits with respect to the facts and issues of this case. Instead, Wallace cites to a Younger Abstention case out of a Maryland district court. *Chesapeake B&M Inc. v. Cassily*, 729 F.Supp. 1106 (D. Md. 1990). However, *Cassily* does not address the merits of whether a clearly established right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution. As such, its holding does not indicate a conflict, much less a conflict among the circuits.

Instead, Wallace himself has shown that, along with the Fifth Circuit, the Eighth and Fourth Circuits have consistently upheld the rule set down in *Heller* and its progeny. *United States v. Echols*, 577 F2d 308 (5th Cir. 1978); *B.A.P, Inc. v. McCulloch*, 994 F.Supp. 1131, 1146 (E.D. Mo 1998), *aff'd* 170 F.3d 804 (8th Cir. 1999); *Hicks v. Taylor*, 153 F.3d 720 (4th Cir. 1998)(unpublished).

As such, Wallace has not shown that there is any conflict among the circuits regarding whether a right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution. Accordingly, this Petition should be denied in its entirety.

CONCLUSION

In view of all the foregoing, Respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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